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IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-5937

VENTURA E. YBARRA,

Appellant,

vs.

PEOPLE OF THE STATE OF ILLINOIS,

Appellee.

ON APPEAL FROM THE APPELLATE COURT OF ILLINOIS, SECOND DISTRICT.

BRIEF OF AMERICANS FOR EFFECTIVE LAW ENFORCEMENT, INC., THE ILLINOIS ASSOCIATION OF CHIEFS OF POLICE, INC., AND THE STATE OF MONTANA, AS AMICI CURIAE IN SUPPORT OF THE APPELLEE.

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This brief is filed pursuant to Rule 42 of the Supreme Court Rules. Consent to file has been granted by the Office of the State Appellate Defender, Ralph Ruebner, Esq., and Alan D. Goldberg, Esq., Counsel for the Appellant, and by Hon. William J. Scott, Attorney General, State of Illinois, Melbourne A. Noel, Jr., Esq., Counsel for the Appellee. Letters of consent of both parties have been filed with the Clerk of this Court. States are not required to obtain consent to file as *amici curiae*.

INTEREST OF THE AMICI CURIAE.

I. General Interest of the Amici Curiae.

Americans for Effective Law Enforcement, Inc. (AELE) is a national, not-for-profit citizens organization incorporated under the laws of the State of Illinois. As stated in its by-laws the purposes of the AELE are:

1. To explore and consider the needs and requirements for the effective enforcement of the criminal law.
2. To inform the public of these needs and requirements, to the end that the courts will administer justice based upon a due concern for the general welfare and security of law abiding citizens.
3. To assist the police, the prosecution, and the courts in promoting a more effective and fairer administration of the criminal laws.

In furtherance of these objectives AELE seeks to represent in our courts, nationwide, the concern of the average citizen with the problems of crime and police effectiveness to deal with crime.

The Illinois Association of Chiefs of Police, Inc., is a not-for-profit Illinois association and consists of over 600 members who are Illinois police chiefs and senior law enforcement executives. It, too, seeks to represent in our courts the concern of the average citizen with the problems of crime and police effectiveness in dealing with crime, with special emphasis upon the problems and concerns of police officers who face numerous legal and practical problems on a day-by-day basis in their effort to protect public safety.

The Attorney General of Montana is the chief law enforcement officer of his state with oversight for the fair and effective enforcement of the criminal law therein. Montana has a statute similar to the Illinois statute involved in this case.

II. Special Interest of the Amici Curiae.

Our particular interest in this case arises from the important constitutional and policy questions involved in the Illinois Statute (Illinois Revised Statutes, 1975, Chapter 38, Sec. 108-9) and the particular facts of this case. It is our belief that such a statute is absolutely essential to the protection of police officers from attack while executing duly issued search warrants, and in preventing the disposal or concealment of evidence described in such warrants and the discovery of other contraband, including weapons. It is our belief that when measured against the requirements of the Fourth Amendment, such a statute is reasonable on its face, and in its application, including to the facts of this case. The existence of such statutes encourages police officers to utilize the constitutionally preferred procedure of submitting their facts for a premises search to a magistrate for a search warrant, see *U. S.* v. *Ventresca,* 380 U. S. 102 (1965). We further believe that such statutes are highly desirable as reasonable and proper tools of law enforcement and that affirmance of the opinion of the court below will encourage the states to enact narrowly drawn and applied statutes that will serve the interests of law enforcement and protect the privacy and personal integrity of our law-abiding citizens.

ARGUMENT.

I.

Introduction.

Illinois Bureau of Investigation agents obtained a warrant for a search of a tavern in Kane County, Illinois known as the "Aurora Tap" for "evidence of the offense of possession of a controlled substance to be seized therefrom: heroin, contraband and other controlled substances, money, instrumentalities and narcotics, paraphernalia used in the manufacture processing and distribution of controlled substances." The Illinois Appellate

Court, Second District, in its opinion stated that ". . . in the complaint for the search warrant before us the allegation was made that the bar was frequented by persons illegally purchasing drugs," 373 N. E. 2d 1013, 1015, although the accuracy of this statement is disputed by the appellant in his brief. The premises were described by the Appellate Court as "dismal, drab and shabby," consisting of one room.

Only twelve patrons were present when the State agents, assisted by local police, arrived. In addition to a search of the premises, the patrons were searched. During the initial pat down of the appellant an officer felt a cigarette package with objects in it. A second search of his person turned up six tinfoil packs of heroin.

Probable cause for the search warrant is not an issue in this case. Appellant contends that the Illinois statute providing that a person executing a search warrant may search any person in the place at the time to prevent the disposal of articles or things described in the warrant is violative of the Fourth Amendment as applied to him. The statute is set forth as follows:

> *Illinois Revised Statutes,* 1975, Chapter 38, Sec. 108-9
>
> Detention and Search of Persons on Premises. In the execution of the warrant the person executing the same may reasonably detain to search any person in the place at the time:
>
> (a) To protect himself from attack,
>
> or
>
> (b) To prevent the disposal or concealment of any instruments, articles or things particularly described in the warrant.

The trial court denied appellant's motion to suppress, finding that the search in question was permissible under Section (b) of the statute. The Illinois Appellate Court affirmed this finding and the conviction, ruling that the statute, as applied to a search for articles or things described in the warrant, did not offend the Fourth Amendment. The Court made it clear that

such a warrant would not authorize a "blanket search" of persons or patrons found in "large" retail or commercial establishments.

> But in the case before us the search was conducted in a one room bar where it is obvious from the complaint of the officers seeking the search warrant that heroin was being sold or dispensed. 373 N. E. 2d 1013, 1018.

The opinion of the Appellate Court states that four other jurisdictions have similar statutes—Arizona, Kansas, Georgia and the District of Columbia—and the Court turned to several of the reported decisions of these jurisdictions, as well as Illinois, for construction of the statute and resolution of the constitutional issue.

A recent work by a distinguished authority on the Fourth Amendment notes that the courts of these states have upheld searches similar to that in the instant case on the basis of such statutes. La Fave, Search and Seizure, Vol. 2, p. 144 (1978). A 1973 Law Review Comment stated that eleven states at that time empowered the police, when executing a search warrant, to search all persons found on the premises described therein. Three such states granted this power through a specified form of warrant (Del., Mass., N. H.) while eight simply authorized the search without setting forth an "approved" form of warrant (Conn., Ga., Ill., Kan., Mont., Nev., N. Y., Wis.). Comment, 58 Cornell L. Rev. 614 (1973).

Thus, several jurisdictions have at various times sought to clarify police powers in searching persons present at the time and place of execution of a search warrant. The comments of the Illinois Revision Committee probably best summed up the common legislative intent running through these statutes when it stated:

> The Committee felt that this section is necessary because it gives the officer a clear outline of his power in executing the warrant and removes doubt from a rather cloudy area of the law. Revision Committee Comments to Ill. Ann. Stat. ch. 38, Sec. 108-9 at 271 (Smith-Hurd, 1970).

This attempt to clarify police powers in this area of Fourth Amendment rights, and to link it to the special protections surrounding a search warrant—as opposed to warrantless searches where no determination of probable cause for the initial search has been made by a magistrate—is submitted by *amici* to be a laudatory legislative activity that should be encouraged by the Supreme Court by a decision upholding the search in the instant case.

II.

The Appellant Was Not Entitled to Suppression of the Heroin Seized from His Person, as the Police Officers Would Have Been Fully Justified in Searching Him Under the Facts of This Case Even Without the Statute.

The record from the preliminary hearing and trial indicates that when the police arrived at the Aurora Tap they announced their purpose and advised the 12 patrons that they were going to make a cursory search for weapons. No patrons were allowed to leave and no one was permitted to enter while the search took place. Appellant was patted down by Agent Johnson who stated that he felt a cigarette pack with objects in it. A second search of appellant two or three minutes later resulted in the removal of six tin foil packets of heroin from his pocket. Agent Johnson described his search of the appellant as "more or less a pat down, cursory search for weapons for our protection."

Under the rule of *Terry* v. *Ohio*, 392 U. S. 1 (1968), the police may take appropriate self-protective action when performing their duty in potentially dangerous situations. While *Terry* involved a stop and frisk in a typical street encounter setting, its rationale is equally applicable to situations where the police are executing a search warrant, and it is submitted that its sweep should be significantly broader in the latter cases.

Under *Terry* the self-protective search is limited to a pat-down of the suspect's outer clothing and a seizure of only hard objects whose size and shape give the officer probable cause

to believe that the suspect is armed. Obviously a police officer executing a search warrant has placed himself in a unique zone of danger. Persons at the scene may be potentially dangerous, since they may be powerfully motivated to conceal evidence of a crime, assault or kill the officer to prevent arrest, or seek to escape. The analogy to *Terry* is appropriate and the pat-down authority is clear.

However, what if the pat-down does not indicate the existence of an object that could be a weapon, but indicates that it might be the type of evidence specified in the warrant? Are the police then powerless to act? This seems manifestly absurd. It would seem that if the police have come by their information through purely proper means (the pat-down for their self-protection), then they should not be required to ignore the presence of the very evidence specified in their warrant, as to which they have a *duty* laid upon them by the command of a magistrate to search for and recover such evidence. Ignoring such evidence and failing to seize it forthwith would be a violation of that duty.

This was the case in *State* v. *Yarbrough*, 26 Or. App. 481 (1976), where the police were executing a search warrant for balloons of heroin. In their pat-down of the defendant who was at the scene, it was concluded by the police that an object felt on his person was not a weapon but was apparently one of the items listed in the search warrant. They seized it and the search was ruled proper.

In the instant case the warrant was for "heroin, contraband and other controlled substances, money, instrumentalities and narcotics, paraphernalia used in the manufacture processing and distribution of controlled substances." Even members of the general public are by now familiar with the fact that such objects are frequently carried by criminals in cigarette packs, and certainly the police are aware of this. *U. S.* v. *Robinson*, 414 U. S. 218 (1973). When Agent Johnson conducted the pat-down of appellant, which he was entitled to do under *Terry*, and felt the cigarette pack, he had probable cause to believe

that appellant possessed evidence named in the warrant and was entitled to seize it.

It is submitted, however, that a more extensive patdown of suspects in search warrant execution cases should be allowed by this Court than would be permitted by *Terry* in the typical street encounter. The limited patdown of outer clothing permitted by *Terry* was tailored to the conditions of a one-on-one confrontation where the officer is focusing his attention upon one suspect. Under these conditions the suspect has relatively fewer opportunities to bring a weapon to bear against the officer. In a search warrant execution situation, however, the suspect will have more opportunities to reach into a pocket, purse, or bag while the police concentrate on moving about the premises to conduct the search. The primary focus of the police is the premises, not the persons on the premises. A search of premises is at best an arduous task calling for concentration free from distractions, and it allows the persons on the premises ready opportunities to do harm to the officers, unless such persons can be effectively neutralized.

It has been pointed out that it may be asked whether it is even necessary for the police to be able to point to specific and articulable facts tending to connect the person present at the scene of a search pursuant to a warrant with the criminal activity under investigation, or whether something less should suffice. LaFave, Search and Seizure, Vol. 2, p. 150 (1978). Perhaps it should be sufficient that the criminal activity that is the object of the search warrant is serious and that the person to be frisked is connected with the place where the criminal activity is taking place or evidence thereof is found pursuant to the warrant. As stated in *People* v. *Finn*, 73 Misc. 2d 266 (N. Y. 1973), it is "generally known by the police and others that those who traffic in large quantities of narcotics are often armed."

The mere presence of such persons should, as noted in *Finn*, be sufficient to give rise to sufficient and legal justification for the police to frisk all persons present for weapons, although *Finn*

involved the search of persons in an apartment, and *amici* do not argue for a rule broader than that which would be appropriate for the facts in the instant case, i.e., in relatively small premises, with a limited number of persons within the zone of danger to the police, and excluding large commercial or retail establishments.

Thus, it is submitted that a lesser showing that a person to be frisked "may be armed and presently dangerous" should suffice in these cases than would be required by *Terry* for a typical street confrontation. And when such a frisk reveals the presence of an object that the police reasonably believe may be an object specified in the search warrant, they should be permitted to complete their search and seize the object.

III.

A Statute Authorizing a Person Executing a Search Warrant to Search Any Person in the Place at the Time to Protect the Police from Attack or to Prevent the Disposal of Evidence Does Not Violate the Fourth Amendment on Its Face, or as Applied to the Facts of This Case.

As noted *supra*, Section (a) of the statute is no more than a codification of existing common law principles enunciated in *Terry* v. *Ohio*, 392 U. S. 1 (1968), and related cases, permitting the police to take appropriate self-protective action when executing a search warrant.

On the other hand, the legislative intent of the Illinois draftsmen with respect to Section (b) is best set forth in the Illinois Revision Committee comments:

> In addition it is clear that the purpose of the warrant would be thwarted were not the officer given the second power found in subsection (b), i.e. to search the person for the things to be seized. The need for this power arises most often in the narcotics cases where disposition is most easily effected. Ill. Ann. Stat. ch. 38, Sec. 108-9, Revision Committee Comments at 271 (Smith-Hurd, 1970).

This Section, on its face, and as construed by the Appellate Court, would not permit the search of all persons present upon public premises during execution of a search warrant merely because of their presence on the premises. The Court was careful to carry out the legislative intent by limiting application of the Section to situations such as those in the instant case where, because of the size of the premises, the type of evidence sought, and the number of persons present at the scene when the police arrived, there would be probable cause to believe that evidence which might be concealed or destroyed was on the persons of those present. So construed and applied, such a statute can not be considered as one permitting a constitutionally proscribed general search, see *Willis* v. *State,* 122 Ga. App. 455 (1970), *Kansas* v. *Loudermilk,* 208 Kan. 893 (1972), and *U. S.* v. *Graves,* 315 A. 2d 559 (D. C. App. 1974). As the Illinois Appellate Court stated:

> Such a warrant obviously would not authorize a "blanket search" of persons or patrons found in a large retail or commercial establishment. But in the case before us the search was conducted in a one room bar where it is obvious from the complaint of the officers seeking the search warrant that heroin was being sold or dispensed. *People* v. *Ybarra,* 373 N. E. 2d 1013, 1016.

It is submitted that facially, and as construed by the Appellate Court, the statute does no more than incorporate a police officer's common law powers to take self-protective action when executing a search warrant, and a probable cause-reasonableness standard with respect to the search of persons found on the premises at the time of the search.

Amici are aware of no reported appellate decisions that have construed or applied like statutes beyond the constitutional parameters of the Fourth Amendment. The most recent decision concerning such a statute is *Patton* v. *State,* ..... Ga. App. ....., 252 S. E. 2d 678 (1979). In that case the police possessed a search warrant for marijuana for the residence and person of one "Tommy Last Name Unknown". Upon their

arrival on the premises they found several other persons, including the defendant. Defendant was directed to empty his pockets on a table, a search that was permissible under Ga. Code, Section 27-309(b), which is similar to Illinois Revised Statutes, 1975, Chapter 38, Sec. 108-9(b). When defendant did so, it was apparent that he did not have marijuana on his person but he did have pills contained in a plastic bag. Based upon his experience the officer believed that the pills were illegal drugs and the Georgia Court ruled that they could be seized under the Plain View Doctrine.

IV.

Such a Statute Is Necessary and Desirable to Law Enforcement in Order to Prevent the Disposal or Concealment of Evidence, Including Weapons.

Amici wish to demonstrate the practical ramifications of a statute such as Illinois Revised Statutes, 1975, Chapter 38, Sec. 108-9 to legitimate law enforcement activity, not only from the standpoint of the protection of police officers involved in the execution of search warrants by the discovery and confiscation of weapons, but the collection of evidence specified in such warrants and other contraband that might otherwise be lost due to its concealment upon the persons of individuals present when search warrants are executed.

With the cooperation of the Chicago Police Department we examined the files of over 60 cases where search warrants were executed with the attendant use of the Illinois statutory procedure to search persons present on the premises. These cases included fact situations involving a search of a limited number of persons on public premises not unlike those involved in the instant case, as well as private premises, including houses and apartments. Most warrants were for narcotics and related paraphernalia, while some were for gambling implements and related paraphernalia. In most cases evidence specified in the warrant

was seized as a result of the personal searches. In many cases weapons were seized. Several representative cases are presented here with a brief narration of the pertinent facts. Each case is identified by the official Chicago Police Department Records Division Number.

X 708253

This case involved a search warrant for an apartment and a named individual for narcotics. Upon arrival the police found nine persons present. All were searched: two were arrested when narcotics were found on their persons; two were arrested when weapons were found on their persons; five were released without charges.

A 703672

This case involved a search warrant for a store front and a named person for gambling paraphernalia. Two other persons found on the premises were searched, in addition to the person named in the warrant, with the police finding $100, $300, and $374 in horse bets on the individuals respectively.

Z 722653

This case involved a search warrant for a record shop and a person for narcotics. A search of the named person, the premises and a second person found on the premises all uncovered narcotics.

Z 713146

This case involved a search warrant for a Race Track Messenger Service and an arrest warrant for a named individual. When the search warrant was executed, a large number of race horse bets and pari-mutuel lottery wagers were found on a table. The named suspect was arrested. Another person found on the premises was searched, turning up race horse bets and $1,100 in currency.

P 726675

Here the police had a search warrant for an apartment for narcotics and another search warrant for a person at the apartment. In addition to the named person, several other

persons were found on the premises. A search of the named suspect and three other persons uncovered various quantities of controlled substances and unregistered firearms, including a revolver and an automatic weapon. A search of four other persons on the premises revealed no narcotics, other contraband, or weapons and these persons were not charged with any crime.

A 703464

Here the police had a search warrant for a residence and its lessee. Upon arrival the lessee and five other persons were found on the premises. The police were required to use force to gain entry when the occupants refused to open the door. All persons were searched and a quantity of narcotics was found on four persons and on the premises.

A 703426

This case involved a search warrant for an apartment for narcotics. Six persons were present and searched, three having narcotics on them, for which they were arrested on possession charges.

Y 701990

This case involved execution of a search warrant for a residence after investigators made a controlled buy on the premises. When the warrant was executed the police found five persons on the premises. Marijuana was found on three of the persons.

Z 717069

This case involved a search warrant for second and third floor apartments for narcotics and a named person. A search of the named person and two other persons found in the apartments revealed a quantity of narcotics. A loaded revolver was also found on the premises.

Z 700216

This case involved a search warrant for a bar, a patron and the bartender for narcotics. Six patrons and the bartender on the premises were searched and various quantities of narcotics and weapons were found on their persons.

It is submitted that these typical cases demonstrate the necessity and desirability of the power to search persons at the scene of the execution of a search warrant to protect police officers and to prevent the disposal or concealment of evidence or contraband. In the words of the Illinois Revision Committee, codification of this power ". . . is necessary because it gives the officer a clear outline of his power in executing the warrant and removes doubt from a rather cloudy area of the law." Revision Committee Comments to Ill. Ann. Stat. ch. 38, Sec. 108-9 at 271 (Smith-Hurd, 1970). We agree, and respectfully submit to this Court that its affirmance of the appellant's conviction will give the states the encouragement they need to enact similar statutes that, in effect, protect individual rights in this important Fourth Amendment area by articulating the exact scope and extent of police search powers while executing search warrants.

CONCLUSION.

Appellant's conviction should be affirmed. The search of appellant was fully justified even without the statute in question. The statute passes constitutional muster on its face and as construed by the Appellate Court and as applied to the facts of this case. Such statutes are necessary and desirable to effective law enforcement and will be encouraged by the Supreme Court's affirmance of appellant's conviction in this case.

Respectfully submitted,

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